IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**CRIMINAL ACTION**
	:	**NO. 98-301**
LUIS REYES	:	
	:	

MEMORANDUM AND ORDER

Stengel, J. January 4 , 2007

On September 25, 1998, defendant Luis Reyes ("Defendant") pleaded guilty to an eight-count indictment and on January 6, 1999, he was sentenced to 168 months in prison. On December 12, 2005, the Defendant filed the motion under consideration to correct the Judgment and Commitment Order ("J&C") completed in connection with his sentencing. The Defendant argues that the J&C does not accurately reflect the sentence imposed at the January 6, 1999 sentencing hearing. The Government filed a response in opposition to the Defendant's motion on December 21, 2006. For the reasons set forth below, I will grant the Defendant's motion and order the deletion of the following phrase from page four of the J&C: "This sentence is to run consecutively to any state sentence that defendant receives."

I. BACKGROUND

On September 25, 1998, the Defendant pleaded guilty to the following eight counts: (1) one count of conspiracy, in violation of 18 U.S.C. § 371; (2) once count of conspiracy

to commit Hobbs Act Robbery, in violation of 18 U.S.C. § 1951; (3) three counts of carjacking, in violation of 18 U.S.C. § 2119; and (4) three counts of interference with interstate commerce by robbery, in violation of 18 U.S.C. § 1951. On January 6, 1999, U.S. District Court Judge Franklin S. Van Antwerpen conducted a sentencing hearing and sentenced the Defendant to 168 months in prison. At the hearing, after the sentence was imposed on the Defendant, the following exchange occurred between the court and the Defendant's counsel, Mack Refowich:

> Court: Now, I am not making any findings with regard to any other sentences, because none have been imposed. My understanding is that this would make this consecutive to any state sentence that would be imposed. I believe that is in keeping of the spirit of the guidelines as well as the statements made at sentencing, the nature of the offense and the defendant's history, characteristics, educational, vocational and corrective needs, as well as the need for the deterrence and protection of the public.
>
> Are there any additions or corrections to the sentence? Anything from the defense, Mr. Refowich? Do you want a recommendation?
>
> Refowich: He's asking whether the sentence is consecutive to the state's court's.
>
> Court: That will be up to the state court judge. I'm not making any recommendations. As it stands right now under federal law it would be consecutive, but that's up to the state court judge really. If he can somehow run his sentence along with mine, that's up to him. I can't make any final finding in that regard today because there is no other sentence.

Sentencing Hr'g Tr. 20-21.

As part of the Defendant's sentencing, Judge Van Antwerpen completed and executed a Judgment and Commitment Order. The pertinent part of the J&C is on page four, under the section entitled "Imprisonment," and states:

> The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for the total term of 168 months. 60 months on Count 1. 168 months on each of counts 2, 3, 4, 5, 6, 7 and 8 to run concurrently with each other and concurrently with Count 1 for a total sentence of 168 months. . . . *This sentence is to run consecutively to any state sentence that defendant receives.*

J&C at 4 (emphasis added).

Based on the above exchange at the sentencing hearing and the language used in the J&C, the Defendant filed the current Motion to Correct the Judgment and Commitment Order pursuant to Federal Rule of Criminal Procedure 36 ("Rule 36") on December 5, 2005. On November 7, 2006, the Defendant filed a Second Request for Correction of Clerical Error in the Judgment and Commitment Document and Request for an Expedited Hearing. The Government filed its response in opposition to the Defendant's motions on December 21, 2006.

II. DISCUSSION

The Defendant contends that a clerical error was made in the completion of the J&C and that this court should correct the mistake under Rule 36. In particular, the Defendant argues that the last sentence of the "Imprisonment" section of the J&C — *This sentence is to run consecutively to any state sentence that defendant receives* — should be deleted because it does not properly reflect the sentence imposed on him at his sentencing

hearing. The Government opposes the Defendant's motion and argues that "[t]he record demonstrates that the judgment order signed by the Court accurately reflects the judgment pronounced in open court." Gov't Resp. to Def.'s Mot. at 3.

Rule 36 states as follows: "After giving any notice it considers appropriate, the court may at any time correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission." FED. R. CRIM. P. 36. In the consideration of a judgment or order under Rule 36, only clerical errors can be corrected. "'A clerical error involves a failure to accurately record a statement or action by the court or one of the parties.'" United States v. Bennett, 423 F.3d 271, 277-78 (3d Cir. 2005) (quoting 26 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE P 636.02[2] (3d ed. filed through 2005)); see also Pfizer Inc. v. Uprichard, 422 F.3d 124, 129-30 (3d Cir. 2005) (defining a clerical mistake under Federal Rule of Civil Procedure 60(a), the civil analogue of Rule 36, as "'only errors mechanical in nature, apparent on the record, and not involving an error of substantive judgment.'").[1] As the language of the rule suggests, no time limit exists as to when a court may correct a

[1]In United States v. Bennett, the Third Circuit noted the distinction that Rule 36 makes between a judgement or order and the rest of a case record:

> While Rule 36 allows a court to correct clerical errors or errors of oversight or omission "in the record," it only allows correction of clerical errors in the judgment or order. This difference in language is important. While Rule 36 provides a broad mandate to correct a variety of errors in ancillary parts of the record – the dates of documents, the indictment, etc. – it provides only a strictly limited authority to correct the court's judgment or order. The judgment of a court, unlike the rest of the court's record, has legal effect; substantive changes to the judgment may normally be made only by appellate review or similar procedures.

Bennett, 423 F.3d at 278 n.4.

judgment or order under Rule 36. See Bennett, 423 F.3d at 277-78 (discussing the limits of Rule 36 and noting it "has no time limit").

In United States v. Bennett, 423 F.3d 271 (3d Cir. 2005), the Third Circuit clarified when a correction to a sentencing judgment or order is appropriate under Rule 36. Rule 36 is not intended "to correct substantive errors in the sentence, which are dealt with by other provisions," namely Federal Rule of Criminal Procedure 35 and 18 U.S.C. § 3742. Id. at 278. "Rule 36 does not authorize the sentencing court to correct a sentence imposed in violation of law, as a result of an incorrect application of the sentencing guidelines, or to otherwise substantively modify sentences." Id. (quotation and citation omitted). Rather, Rule 36 is intended to correct a clerical error in a sentencing order and a "clerical error must not be one of judgment or even of misidentification, but merely of recitation, of the sort that a clerk or amanuensis might commit, mechanical in nature." Id. (quotations and citation omitted). "In most cases, an error made by the court in imposing its oral sentence will not be a clerical error within the meaning of Rule 36. . . . Rule 36 is normally used to correct a written judgment of sentence to conform to the oral sentence pronounced by the judge." Id. (citing 26 MOORE ET AL., supra, P636.03[1][c]).

Here, Judge Van Antwerpen clearly stated on the record that he was not ruling on whether the federal sentence he had just imposed would run consecutively or concurrently with any state sentence. In fact, Judge Van Antwerpen could not have decided how the Defendant's federal and state sentences would run because at the time of the federal

sentencing hearing no state sentence existed. Although Judge Van Antwerpen expressed how he would rule and what the federal guidelines would require if a state sentence did exist, those statements at the hearing did not form part of the Defendant's actual sentence. The Defendant was "committed to the custody of the Bureau of Prisons to be imprisoned for a total term of 168 months" and the court did "not make any findings with regard to any other sentences, because none have been imposed." Sentencing Hr'g Tr. 19-21.

The written J&C does not reflect the oral pronouncement of Judge Van Antwerpen. The J&C definitively states that the sentence of 168 months imprisonment is to run consecutively to any future state sentence. No such sentence was imposed on the Defendant, and, therefore, the written J&C incorrectly states the Defendant's sentence. The mistake is "mechanical in nature," in that it is apparent on the record and it is one that a clerk might make in transcribing the oral sentence. Rule 36 allows this court to correct such a sentence and the best way to accomplish that task is to delete the questioned sentence from the J&C.

The Government argues that Rule 36 does not allow this court to change the J&C so that the J&C "reflect[s] a sentence concurrent with a state sentence" "because doing so would not merely correct a clerical error but substantively alter a final judgment." Gov't Resp. to Def.'s Mot. at 4. The Government's argument is not persuasive. First, the Defendant's motion only seeks to delete the requirement of consecutive sentences. The determination of whether the federal sentence runs consecutively or concurrently with any

existing state sentence is a decision for the state court, as Judge Van Antwerpen indicated. Second, the Defendant is not seeking a substantive change to his sentence. The Defendant is not requesting that the sentence be altered because it violated the sentencing guidelines nor is he arguing that the sentence imposed was in violation of the law. He is merely requesting that the J&C conform to what was said in open court by Judge Van Antwerpen. "Rule 36 is normally used to correct a written judgment of sentence to conform to the oral sentence pronounced by the judge." Bennett, 423 F.3d at 278. Finally, it is a "firmly established and settled principle of federal criminal law that an orally pronounced sentence controls over a judgment and commitment order when the two conflict" United States v. Chasmer, 952 F.2d 50, 52 (3d Cir. 1991) (quoting United States v. Villano, 816 F.2d 1448, 1450 (10th Cir. 1987)). Here, the oral sentence and the J&C conflict with respect to how the federal sentence and any state sentence should run. Judge Van Antwerpen's sentence at the January 6, 1999 hearing controls.

A clerical error was made in the J&C of the Defendant and Rule 36 allows this court to correct that error so the J&C accurately reflects the sentence imposed. Accordingly, I will grant the Defendant's motion and order the Clerk to delete the following sentence from page four of the J&C: *This sentence is to run consecutively to any state sentence that defendant receives.*

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ORDER

AND NOW, this 4th day of January, 2007, upon consideration of Defendant's Federal Rule of Criminal Procedure 36 motion to correct a clerical error in his Judgment and Commitment Order (Docket Nos.116 and 119), and the response thereto, it is hereby **ORDERED** that the motion is **GRANTED**.

The Clerk of Court shall delete the following sentence from page four of the Defendant's Judgment and Commitment Order: *This sentence is to run consecutively to any state sentence that defendant receives.*

BY THE COURT:

/s/ Lawrence F. Stengel
LAWRENCE F. STENGEL, J.